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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,
Plaintiff/Respondent,
vs.
Aquileo Melchor-Zaragoza,
Defendant/Movant.

No. CR 01- 017 PHX-JAT
CV 04-2766 PHX-JAT (LOA)

REPORT AND RECOMMENDATION

This matter arises on Movant's Motion to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody pursuant to 28 U.S.C. § 2255 (document # 290). Movant has also filed a memorandum in support of his Motion (document # 291). The Government filed a Response to the Motion (document # 298) to which Movant has replied. (document # 304).

BACKGROUND

On June 26, 2001, Movant was charged with: (1) Conspiracy to Commit Hostage Taking (18 U.S.C. §§ 371 and 1203); (2) Hostage Taking (18 U.S.C. §§ 1203 and 2); (3) Conspiracy to Harbor Illegal Aliens (8 U.S.C. §§ 1324(a)(1)(A)(iii) and (a)(1)(A)(v)(I)); (4) Harboring Illegal Aliens (8 U.S.C. §§ 1324(a)(1)(A)(iii) and (a)(1)(A)(v)(II)); (5) Possession or Use of a Firearm in a Crime of Violence (18 U.S.C. §§ 924(c) and 2); and (6) Re-entry After Deportation (8 U.S.C. § 1326(a) enhanced by (b)(1)). (document # 30) After a jury trial, on March 20, 2002, Movant was convicted of counts one through five. (Respondents' Exh. B) Movant had previously pleaded guilty to the count six

1 of the superseding indictment, Re-entry After Deportation. On June 10, 2002, the Court
 2 sentenced the Movant as follows: 327 months for counts one and two; 120 months for
 3 counts three, four, and six (to be served concurrently with counts one and two); and 84
 4 months for count five (to be served consecutive to counts one through four, and six). The
 5 Court also sentenced Movant to five years of supervised release for counts one, two, and
 6 five, and three years of supervised release for counts three, four, and six. A \$600 special
 7 assessment was also ordered. (document # 202) Movant appealed and the Ninth Circuit
 8 Court of Appeals affirmed Movant's convictions and sentences on January 5, 2004.

9 Thereafter, Movant filed the pending § 2255 Motion raising the following nine
 10 claims: (1) Sentencing enhancements violated his due process and Sixth Amendment rights
 11 as set forth in Apprendi v. New Jersey, 530 U.S. 466 (2000), Blakely v. Washington, 124 S.
 12 Ct. 2531 (2004) and United States v. Ameline, 376 F. 3d 967 (9th Cir. 2004)¹; (2) the District
 13 Court violated his Due Process and his Sixth Amendment rights by imposing a two-level
 14 increase for vulnerable victim; (3) counsel was ineffective in failing to argue that the court

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 16 ¹ After Movant filed his motion citing United States v. Ameline, 376 F.3d 967 (9th Cir. 2004),
 17 the Ninth Circuit amended its opinion and superseded on rehearing in United States v. Ameline, ____
 18 F.3d ____, 2005 WL 350811 (9th Cir., Feb. 9, 2005) and granted rehearing en banc by United States v.
 19 Ameline, ____ F.3d ____, 2005 WL 612710 (9th Cir., March 11, 2005). This order vacated the previous
 20 opinion which Movant cites and directed that the panel opinion may not be cited as precedent in any
 court of the Ninth Circuit, except to the extent that it may be adopted by the en banc court. See, 2005
 WL 612710. Thus, Movant's citations to Ameline as it was decided in 2004 does not state any ground
 for relief.

21 After Movant's conviction was final and after he filed the pending § 2255 motion and his Reply,
 22 on June 1, 2005, the Ninth Circuit decided United States v. Ameline, 409 F.3d 1073 (9th Cir. 2005).
 23 In Ameline, the court held that "when [the court of appeals] is faced with an unpreserved Booker error
 24 that may have affected a defendant's substantial rights, and the record is insufficiently clear to conduct
 25 a complete plain error analysis, a limited remand to the district court is appropriate for the purpose of
 26 ascertaining whether the sentence imposed would have been materially different had the district court
 27 known that the sentencing guidelines were advisory" if so, there is plain error requiring resentencing
 28 if defendant so desires, and if not, there is no plain error and the original sentence is merely subject to
 review for reasonableness. Id. at 1075-75. In view of the consistency of the appellate court decisions
 cited at pages 3-10 of this Report and Recommendation which hold that Blakely and Booker do not
 apply retroactively on collateral review, the Court concludes that Ameline, which is based on those
 cases, does not apply retroactively on collateral review. The Ninth Circuit has only held that the
 procedure set forth in Ameline applies to cases pending on *direct* review at the time that Ameline was
 decided on June 1, 2005.

could not increase his sentence based on facts not charged in the indictment or found by the jury; (4) the rulings of Apprendi, Blakely, and Ameline should apply retroactively to this case; (5) Count One contained five or more charges in violation of Movant's Fifth and Sixth Amendment rights; (6) the Fifth and Sixth Amendment were violated because Movant was charged with multiple conspiracies for a single scheme or plan; (7) the jury instructions broadened the scope of the indictment in violation of Fifth Amendment; (8) the Fifth and Sixth Amendment were violated because Movant was charged with both the possession and brandishing elements of 18 U.S.C. § 924(c); and (9) trial and appellate counsel were ineffective in failing to argue the merits of claims five through eight, in regard to the duplicitous and multiplicitous charges of the indictment.

ANALYSIS

I. Claims Under Apprendi, Blakely, and Ameline (Claims 1, 2 and 4)

In his first claim, Movant asserts that his sentence was improperly increased based on facts neither charged in the indictment, submitted to a jury, nor proven beyond a reasonable doubt. Movant's second claim asserts that his constitutional rights were violated when the court imposed a two-level vulnerable victim enhancement, and the facts upon which the enhancement were based were neither charged in the indictment, found by a jury, nor admitted by Movant. Movant cites Blakely, Apprendi, and Ameline in support of both claims. (document # 291 at i) In claim four, Movant asserts that Blakely and Apprendi should be applied retroactively to his case. In his Reply, Movant expands grounds 1, 2, and 4 to include a claim based on United States v. Booker, 125 S.Ct. 738 (2005) which was decided after Movant filed his § 2255 motion. The Court will address these related claims below.

A. Apprendi Claim

Apprendi was decided in 2000, while Movant's criminal proceedings were on going. Because Apprendi was decided before Movant's conviction became final, its holding applies to Movant's case. Movant, however, is not entitled to relief under Apprendi. Apprendi held that "[o]ther than the fact of a prior conviction, any fact that increases the

1 penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury,
 2 and proved beyond a reasonable doubt." 530 U.S. at 490. Apprendi, however, did not apply
 3 to the Federal Sentencing Guidelines. United States v. Hernandez-Guardado, 228 F.3d
 4 1017, 1026-27 (9th Cir. 2000). As the Eleventh Circuit explained,

5 While Apprendi was silent on the issue, its inapplicability to the Sentencing
 6 Guidelines follows from its holding. A factual finding under the Guidelines
 7 determine the sentence within the statutory range rather than outside it.
 8 Because Apprendi only addresses facts that increase the penalty for a crime
 9 beyond the statutory maximum, it does not apply to those findings that merely
 10 cause the guideline range to shift within the statutory range.

11 United States v. Sanchez, 269 F.3d 1250, 1262 (11th Cir. 2001)(en banc). See, United States
 12 v. Guardado, 228 F.3d 1017, 1026-27 (9th Cir. 2000)(affirming a two-level enhancement
 13 based on a finding under a preponderance of the evidence standard that defendant recklessly
 14 created a substantial risk of death and serious bodily injury where the district court did not
 15 exceed the maximum penalty for the offense charge and therefore did not violate Apprendi.)

16 Here Movant challenges several sentencing enhancements: (1) enhancement
 17 under U.S.S.G. 3D1.2(b), § 3D1.4, and 1B1.2(d).

18 *I. Number of Victims/Sentence on Count One Conspiracy to Commit Hostage*
 19 *Taking* (U.S.S.G. § 1B1.2(d) and § 3D1.2(b), § 3D1.4)

20 Movant claims that U.S.S.G. § 1B1.2(d), conspiracy to commit more than one
 21 offense,
 22 did not apply because the superseding indictment alleged only one victim in the "body" of
 23 the charging document and alleged "many victims" in the overt acts section. (document #
 24 291 at 8-9) Similarly, Movant claims that "there should only be one group count under
 25 U.S.S.G. § 3D1.2(b) and § 3D1.4, instead of 23" (Id. at 9-10)

26 In essence, Movant claims that the district court violated Apprendi in
 27 determining the number of victims and basing Movant's sentence upon the determination
 28 that there were 23 victims when that information was neither charged in the indictment nor
 found beyond a reasonable doubt by the jury. Movant was sentenced to 327 months
 imprisonment on Count I based on the determination that there were 23 victims.

Count I stated that Movant and others "did knowingly and intentionally conspire and agree together to seize and detain and continue to detain *another person . . .*"

(document # 30 at 2) The "Overt Acts" section of Count I stated that "[o]n or about March 23, 2000, Noe Perez-Valtierra, Jorge Camacho-Sanchez, and Apolinar Valtierra-Guerrera, and 20 other illegal aliens were kidnaped at gun point by the defendant and others . . ."

(document # 30 at 2) The jury instruction specific to Count I directed the jury that:

The defendant is charged in Count I of the superseding indictment with conspiracy to commit hostage taking . . . in order for a defendant to be found guilty of this charge, the *government must prove each of the following elements beyond a reasonable:*

First, beginning on or about March 23, 2000, and ending on or about March 25, 2000, there was an agreement between two or more person to commit the crime of hostage taking as charged in the superseding indictment;

Second, the defendant became a member of the conspiracy knowing at least one of its objects and intending to help accomplish it; and

Third, one of the members of the conspiracy performed at least one overt act for the purpose of carrying out the conspiracy, with all of you agreeing on a particular overt act that you find was committed.

(document # 160 at No. 23; Respondents' Exh. A at 142-43) The jury found Movant guilty as to Count I. (Respondents' Exh. B at 4;

The superseding indictment alleges 23 victims and the evidence at trial established that more than 200 persons were seized and detained by the group to which Movant belonged. (document # 179-183) In his § 2255 Motion, Movant does not claim that fewer than 23 victims were involved in the conspiracy. Movant does not dispute the facts upon which the enhancement was premised. Rather, he asserts that the government had to prove the number of victims under the "clear and convincing" standard. (*Id.*)

Because the superseding indictment alleged 23 victims, and the jury found Movant guilty beyond a reasonable doubt of the charges in Count I which alleged 23 victims, there was no Apprendi violation in sentencing Movant on the basis of 23 victims.

2. Vulnerable Victim Enhancement

Movant next challenges the vulnerable victim enhancement under U.S.S.G § 3A1.1(b)(1). (document # 291 at 9-10) Movant claims that all of the victims were

"vulnerable" because of their non-resident status and that their status was taken into account in determining the base offense level of Hostage Taking. Therefore, Movant claims that applying the adjustment for vulnerable victim pursuant to U.S.S.G § 3A1.1(b) amounts to "double counting." Movant raised this same claim in his objections to the PSR. (document # 186 at 4) The Court rejected Movant's claim. (document # 231 at 16) Although Movant bases his challenge to the vulnerable victim enhancement on Appendi, he does not allege what would amount to an Appendi violation. Moreover, Movant concedes that all of the victims were vulnerable. Accordingly, Movant's Appendi challenge to the vulnerable victim enhancement fails.

A. Blakely Claim

Movant also challenges his sentence under Blakely. As an initial matter, Respondent asserts that Movant's Blakely claim is procedurally defaulted because Movant did not raise this claim on direct appeal. The Court need not decide this procedural issue because Movant's claim under Blakely lacks merit.

In Blakely, the Supreme Court extended the rule of Appendi to judicial fact-finding in the sentencing phase. Here, Movant argues that his sentence violates Blakely because "aggravating facts" were not found beyond a reasonable doubt by a jury. 542 U.S. 296 (2004). Because Blakely was decided after Movant's conviction became final, the Court must determine whether it applies retroactively on collateral review.

1. Legal Standard

In Teague v. Lane, 489 U.S. 288, 310 (1989), the Supreme Court held that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." Id. at 310. A case announces a new rule "if the result was not dictated by precedent existing at the time the defendant's conviction became final." Id.

Two exceptions exist to Teague's prohibition against the application of "new rules" of criminal procedure to cases in which the conviction has already become final. First, a new rule applies retroactively if it places "certain kinds of primary, private individual

conduct beyond the power of the criminal law-making authorities to proscribe." Teague, 489 U.S. at 311. Second, a new rule of criminal procedure applies retroactively if it constitutes a "watershed rule[] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." Saffle v. Parks, 494 U.S. 484, 495 (1990). The Supreme Court has noted that "[t]his class of rules is extremely narrow." Schriro v. Summerlin, 124 S.Ct. 2519, 2523 (2004).

Teague applies only to procedural rules, and not to substantive rules deciding the meaning or scope of a criminal statute. Bousley, 523 U.S. at 620. A rule is substantive rather than procedural if "it alters the range of conduct or the class of persons that the law punishes." Summerlin, 124 S.Ct. at 2523. By contrast, "rules the regulate only the manner of determining the defendant's culpability are procedural." Id. Thus, when a defendant seeks to benefit from a judicial opinion issued after a defendant's conviction, the court must first determine whether the opinion announces a new rule of criminal procedure or whether the rule is substantive. Id. If the court determines that the rule is procedural, then the court conducts a three-step Teague analysis. See, Beard v. Banks, 124 S.Ct. 2504, 2511 (2004). First, the court must determine the date on which the defendant's conviction became final. Beard, 124 S.Ct. at 2510. Second, the court must "survey the legal landscape as it then existed" and determine whether the court considering the defendant's claim at the time the conviction became final "would have felt compelled by the existing precedent to conclude that the rule [he] seeks was required by the Constitution." Caspari v. Bohlen, 510 U.S. 383, 390 (1994). Finally, the court must decide whether the rule which the defendant seeks to invoke falls within "one of the two narrow exceptions to the nonretroactivity principle." Id.

2. Teague Analysis of Blakely

Respondent asserts a Teague argument in opposition to Movant's claim for relief based on Blakely. The Court, therefore, must determine whether Blakely applies retroactively on collateral review. Blakely was an expansion of the rule announced in Apprendi that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and

1 proved beyond a reasonable doubt." In Ring v. Arizona, 536 US. 584, 592-93 (2002), the
 2 Supreme Court applied the rule announced in Appendi to require that a jury, rather than a
 3 judge, determine the existence of any aggravating factor required to authorize the imposition
 4 of the death penalty under the relevant state sentencing scheme.

5 Thereafter, in Blakely, the Supreme Court extended the rule announced in
 6 Appendi and Ring to invalidate an upward departure under the Washington state sentencing
 7 guidelines that was imposed on the basis of facts found by the judge at sentencing, even
 8 though the sentence was lower than that statutory maximum for the crime. The Court held
 9 that the sentence violated the Sixth Amendment because the sentence was imposed based on
 10 facts that were "neither admitted by [the defendant] nor found by a jury." Blakely, 124 S.Ct.
 11 at 2531. The Court defined the phrase "statutory maximum" to mean "the maximum
 12 sentence a judge may impose solely on the basis of facts reflected in the jury verdict or
 13 admitted by the defendant." Id.

14 The Supreme Court has held that its decision in Ring, Blakely's predecessor, was
 15 "properly classified as procedural." Summerlin, 124 S.Ct. at 2523. Similar to the holding in
 16 Ring, the holding in Blakely did not alter the range of conduct made criminal by Washington
 17 law, and "rested entirely on the Sixth Amendment's jury-trial guarantee, a provision that has
 18 nothing to do with the range of conduct a State may criminalize." Id. Instead, Blakely and
 19 Ring, "altered the range of permissible methods for determining [a defendant's punishment],
 20 requiring that a jury rather than a judge find the essential facts bearing on punishment." Id.
 21 As the Court stated in Schriro, "[r]ules that allocate decisionmaking authority in this fashion
 22 are prototypical procedural rules" Id. Further, all of the courts of appeals to address
 23 the issue have held that Appendi, the progenitor of both Ring and Blakely, announced a rule
 24 of criminal procedure, not a substantive rule. See, United States v. Swinton, 333 F.3d 481,
 25 488-89 (3d Cir. 2003)(citing cases). Thus, Blakely, like Ring and Appendi, announced a
 26 rule of criminal procedure and this Court must conduct a Teague analysis to determine
 27 whether this rule applies to Movant's case on collateral review.

28 **1. Whether Blakely announced a *New Rule* of Criminal Procedure**

1 Having determined that Blakely announced a procedural rule, the Court must
2 determine whether Blakely announced a "new" rule of criminal procedure. To make that
3 determination, the court must: (1) ascertain when Movant's conviction became final, and (2)
4 review the legal landscape existing at the time Movant's conviction became final and decide
5 whether the rule Movant seeks "was dictated by then-existing precedent." Beard, 124 S.Ct.
6 at 2511.

7 Movant's conviction became final on April 5, 2004, when the time for filing his
8 appeal expired. Clay v. United States, 537 U.S. 2004 (conviction becomes final when
9 Supreme Court "affirms a conviction on the merits on direct review or denies a petition for
10 writ of certiorari, or when the time for filing a certiorari petition expires.") Thus, the Court
11 must survey the legal landscape as of April 5, 2004 to determine whether the holding in
12 Blakely was dictated by the precedent existing at the time.

13 A review of the legal landscape as on April 5, 2004 demonstrates that a district
14 court judge was not prohibited by the then-existing precedent, from determining facts that
15 increased the available sentence under the Sentencing Guidelines without exceeding the
16 statutory maximum sentence. All federal appellate courts to consider this issue after
17 Apprendi was decided but before the Supreme Court issued its decision in Blakely, upheld
18 the application of the Sentencing Guidelines against Apprendi challenges. See, United States
19 v. Kelly, 2005 WL 1801668, * 2 (D.OR, July 21, 2005)(stating that before Blakely, every
20 federal court of appeals had held that Apprendi was not applicable to Guidelines calculations
21 made within the statutory maximum); United States v. Samuel, 296 F.3d 1169, 1172
22 (D.C.Cir. 2002)(stating that "[t]his court and the other courts of appeals have held that
23 Apprendi's rule does not apply to offense characteristics that enhance a defendant's sentence
24 under the Sentencing Guidelines, but that do not increase the sentence above the statutory
25 maximum for the offense of conviction."); United States v. Fields, 251 F.3d 1041, 1043-44
26 (D.C.Cir. 2001)(" Apprendi does not apply to enhancements under the Sentencing Guidelines
27 when the resulting sentence remains within the statutory maximum."); In re Sealed Case,
28 246 F.3d 696, 698 (D.C.Cir. 2001)(stating that considering the "Apprendi Court's explicit

endorsement" of sentence enhancements within statutory limits, "it is hard to see how the Court could have intended to mandate the heightened standard for application of the Guidelines' enhancement instructions when the resulting sentence remains within the statutory maximum."); United States v. Hernandez-Guardado, 228 F.3d 1017, 1027 (9th Cir. 2000); Simpson v. United States, 376 F.3d 679, 681 (7th Cir. 2004)(stating that "before Blakely was decided, every federal court of appeals had held that Apprendi did not apply to guidelines calculations made within the statutory maximum.")

After review of the legal landscape that existed when Movant's conviction became final, the Court concludes that Blakely announced a new rule of criminal procedure because there was no binding precedent at the time Movant's conviction became final that required the court to direct the jury to make findings, beyond a reasonable doubt, concerning the appropriate sentencing guideline range, provided the resulting sentence was within the statutory maximum.

2. Whether Blakely Fits within either of the Teague Exceptions

The Court must next determine whether the Blakely rule fits within an exception to the rule that new rules of criminal procedural do not apply retroactively. As discussed above, retroactive effect is only given to new rules of criminal procedure that: (1) place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to prescribe," or (2) constitute "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." Teague, 489 U.S. at 311. Here, the first exception does not apply because the rule announced in Blakely did not place any kind of conduct beyond the reach of the criminal law.

Second, in view of the Supreme Court's decision in Summerlin, 124 S.Ct. at 2523, Blakely does not fit within the second exception because it does not constitute the type of watershed rule that implicates either fundamental fairness or accuracy to such a degree to be "implicit in the concept of ordered liberty." Graham v. Collins, 506 U.S. 461, 478 (1993). To the contrary, in Summerlin, the Supreme Court rejected the argument that Ring constituted a watershed rule of criminal procedure, even though Ring, like Blakely,

1 prohibited the enhancement of a sentence beyond the statutory maximum unless a jury found
 2 the facts authorizing the enhancement beyond a reasonable doubt. Summerlin, 124 S.Ct. at
 3 2524-26. In finding that Ring did not constitute a watershed rule, the Court noted that the
 4 relevant issue is whether judicial fact-finding so "'seriously diminishe[s]' accuracy that there
 5 is an 'impermissibly large risk' of punishing conduct that the law does not reach." Id. at
 6 2525 (quoting Teague, 489 U.S. at 312-313). The Court found it "implausible" that "judicial
 7 factfinding so seriously diminishe[s] accuracy as to produce an impermissibly large risk of
 8 injustice." Id. Thus, because the Supreme Court has rejected the argument that Ring
 9 constitutes a watershed rule of criminal procedure, and because Ring is the immediate
 10 predecessor to Blakely and because its reasoning is indistinguishable from Blakely, Blakely
 11 does not constitute a watershed rule of criminal procedure that may be applied retroactively
 12 on collateral review. See, Cook, 386 F.3d at 950 (Blakely not retroactively applicable to
 13 case involving a successive § 2255 motion); United States v. Sanchez-Cervantes, 282 F.3d
 14 664, 671 (9th Cir. 2000)(Apprendi is not retroactively applicable to § 2255 cases on
 15 collateral review).

16 Indeed all courts that have considered the question have held that the extension
 17 of the Apprendi rule announced in Blakely does not apply retroactively to cases on collateral
 18 review. See, United State v. Quintero-Araujo, 343 F.Supp.2d 935, 942 (D.Idaho 2004);
 19 United States v. Stoltz, 325 F.Supp.2d 982, 987 (D.Minn. 2004); Orchard v. United States,
 20 332 F.Supp.2d 275, 277 (D.Me. 2004); Concepcion v. United States, 328 F.Supp.2d 372,
 21 374 (E.D.N.Y. 2004); Tisdale v. United States, 2004 WL 2782725, * 7 (D.Kan. Sept. 22,
 22 2004); United States v. Stancell, 346 F.Supp.2d 204 (D. D.C. 2004). This Court agrees with
 23 the reasoning of these cases and similarly finds Blakely nonretroactive in this case where
 24 Movant's conviction was final before Blakely was announced.

25 Because Blakely does not apply retroactively to this case on collateral review,
 26 Movant's challenge to the sentencing enhancement under the rule announced in Blakely
 27 fails.

28 C. Booker Claim

1 Movant further claims that his sentencing enhancements violated the rule
2 announced in Booker. In Booker, the Supreme Court applied the rule of Blakely to the
3 United States Sentencing Guidelines and held that the Guidelines, as written, violate the
4 Sixth Amendment principles articulated in Blakely. United States v. Booker, 543 U.S. ____,
5 125 S.Ct. 738, 749-56 (2005). The Supreme Court severed and excised the provision
6 making the Guidelines mandatory and declared the Guidelines advisory. Id. Booker was
7 not decided until January 12, 2005 well after Movant's conviction and sentence were final.

8 Movant's claim based on Booker fails because that case does not apply
9 retroactively on collateral review. Booker reiterates the ruling stated in Appendi and
10 Blakely that "[o]ther than the fact of a prior conviction, any fact that increases the penalty
11 for a crime beyond the prescribed statutory maximum must be submitted to a jury, and
12 proved beyond a reasonable doubt." Booker, 543 U.S. ____, 125 S.Ct. at 746 (quoting
13 Appendi, 530 U.S. at 490). To determine whether Booker applies retroactively on
14 collateral review, the court must engage in a multi-step analysis. First, the court must
15 determine whether Booker announced a new rule. A "case announces a new rule if the result
16 was not dictated by precedent existing at the time the defendant's conviction became final."
17 Teague v. Lane, 489 U.S. 288, 301 (1989)

18 Here, Movant's conviction became final in April of 2004. Booker was issued on
19 January 12, 2005. Booker, is a new rule for the purposes of this case because at the time
20 Movant's conviction became final, there was no precedent suggesting that the federal courts
21 should consider the Sentencing Guidelines advisory.

22 Second, the court must determine whether the new rule is procedural or
23 substantive. A rule is substantive if it alters the course of conduct or the class of persons
24 that the law punishes. Schriro v. Summerlin, 542 U.S. 348 (2004). On the other hand,
25 "rules that regulate only the manner of determining the defendant's culpability are
26 procedural." The rule announced in Booker is procedural because it only regulates the
27 manner of determining a defendant's sentence. See, United States v. Brown, 2005 WL
28 1463531, * 2 (D.Alaska 2005).

New procedural rules generally do not apply retroactively. Retroactive effect is only given to "watershed rules of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceeding. Summerlin, 542 U.S. 348. In Booker, the Supreme Court stated that Booker applies "to all cases on direct review" but did not mention collateral review. 125 S.Ct. at 769. Every court that has considered whether Booker applies retroactively to cases on collateral review had held that it does not. See, United States v. Brown, 2005 WL 1463531, * 3 (D. Alaska, April 28, 2005); United States v. Green, 2005 WL 237204, * 1 (2d Cir., Feb. 2, 2005); Humphress v. United States, 398 F.3d 855, 860(6th Cir. 2005)(in the context of an initial § 2255, holding that Booker does not apply retroactively on collateral review); McReynolds v. United States, 397 F.3d 479, 481 (7th Cir. 2005); United States v. Leonard, 2005 WL 139183, at * 1 (10th Cir., Jan. 24, 2005); Varela v. United States, 400 F.3d 864, 868 (11th Cir. 2005)(in the context of an initial § 2255, holding that Booker falls into the category of new rules of criminal procedure that are not retroactively applicable on collateral review); Guzman v. United States, 404 F.3d 139, 141 (2d Cir. 2005)(Booker not applicable on collateral review where defendant's conviction was final as of January 12, 2005, the date Booker issued); Hewett v. United States, ___ F.Supp.2d ___, 2005 WL 133116, * 4 (D.H., May 20, 2005)("Every federal court of appeals to address the question of whether Blakely or Booker are retroactive to initial cases on collateral review . . . has held that they are not."); United States v. Wrenn, 2005 WL 1389060, * 2 (D.Or., May 10, 2005)(same).

Because Booker does not apply retroactively on collateral review, Movant's Booker claim fails.

II. Duplicity of Counts One and Two (Claim 5)

In his fifth claim for relief, Movant asserts that Count One and Two of the Superseding Indictment are duplicitous because Count One contained five or more possible charges and Count Two entwines "conspires and attempts" with "aiding and abetting." (document # 291 at 34-37)

Count One of the Superseding Indictment charges Movant with Conspiracy to Take Hostages and sets forth the elements of that offense. Although the hostage taking statute includes an "attempt" provision, the Superseding Indictment does not include the word "attempt." Specifically, Count One charged that:

On or about March 23, 2000 through or about March 25, 2000 in the District of Arizona or elsewhere, defendant AQUILEO MELCHOR-ZARAGOZA . . . and others known and unknown to the Grand Jury, did knowingly and intentionally conspire and agree together to seize and detain and continue to detain another person in order to compel a third person to do an act, to wit: pay money, as an explicit and implicit condition for the release of said person seized and detained. . . . In violation of Title 18 United States Code, Sections 371 and 1203.

(Document # 30 at 1-2)

Title 18 U.S.C. § 371 is the general conspiracy statute, and 18 U.S.C. § 1203 is the hostage taking statute. Movant claims that the language of §1203 indicates that Count One contained duplicitous charges.

Section 1203 provides that :

(a) except as provided in subsection (b) of this section, whoever, whether inside or outside the United States, seizes or detains and threatens to kill, to injure, or continue to detain another person in order to compel a third person or governmental organization to do or abstain from doing any act as an explicit or implicit condition for the release of the person detained, *or attempts, or conspires to do so*, shall be punished by imprisonment.

18 U.S.C. § 1203(a) (emphasis added). Because Count One alleges conspiracy in violation of 18 U.S.C. § 371 and also alleges conspiracy to commit a crime under § 1203, and § 1203 contains its own conspiracy and attempt provisions, Movant claims that Count One actually charged him with "conspiracy, attempt, attempting to conspire, conspiring to attempt, or conspiring to conspire." (document # 291 at 35) Movant further claims that "attempting to conspire" and "conspiring to conspire" are not federal offenses. (document # 291 at 35) Movant also claims that the prosecutor admitted on the record that after the indictment was filed she realized she did not have to charge Movant under the general conspiracy statute, §

371, because § 1203 contains its own conspiracy language.² (See document # 291 at 34-35) (Movant does not give sufficient citation to locate this admission in the record). Movant claims that because the jury used general verdict forms, there is no way of knowing which of these statutes the jury convicted him of violating, and that it is possible that he was convicted of a nonexistent federal offense.

Contrary to Movant's assertion, the jury returned a specific verdict form, not a general form as Movant suggests. The jury's verdict reads: "We, the jury, find the defendant, Aquileo Melchor-Zaragoza, as to Count 1: Conspiracy to Commit Hostage Taking: Guilty. We, the jury, find the defendant, Aquileo Melchor-Zaragoza, as to Count 2: Hostage Taking: Guilty." (Document # 149). The verdict did not mention attempt. Movant was convicted of Conspiracy to Commit Hostage Taking as charged in Count One and Hostage Taking as charged in Count Two, both of which are valid federal offenses.

Movant further claims that Count Two is duplicitous because it entwines the "conspires and attempts" language from 18 U.S.C. § 1203 with the "aiding or abetting" language of 18 U.S.C. § 2. The Court finds no validity in this argument. Count Two of the Superseding Indictment charges that:

On or about March 23, 2000, in the District of Arizona and elsewhere, defendants AQUILEO MELCHOR-ZARAGOZA . . . and others known and unknown to the Grand Jury, did knowingly and intentionally seize and detain, as well as aid and abet, and continue to detain Noe Perez-Valtierra, Jorge Camacho-Sanchez, and Apolinar Valtierra-Guerrera in order to compel others to do an act, to wit: pay money as an explicit and implicit condition for the release of the persons seized and detained. In violation of Title 18 United States Code, Sections 1203 and 2.

(Document # 30 at 2-3).

Title 18 U.S.C. § 2 provides that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." 18 U.S.C. § 2(a). Citing this section in Count Two does not

² There is no evidence in the record supporting Movant's assertion that the prosecutor stated that she did not need to charge Movant under 18 U.S.C. § 371 in view of the conspiracy language contained in 18 U.S.C. § 1203.

render the count duplicitous, rather it clarifies that Movant could be charged under 18 U.S.C. §1203 as a principal even if he only aided and abetted the hostage taking.

In view of the clear text of the indictment and the verdict, the distinctions between Counts One and Two are clear, and there is no basis to conclude that Movant was convicted of a nonexistent federal offense or faced duplicitous charges. Accordingly, Movant's fifth claim for relief fails.

III. Multiple Conspiracy Charges (Claim Six)

In his sixth claim for relief Movant claims that the Government violated his Fifth and Sixth Amendment rights by dividing a single conspiracy to effect a common scheme or plan into five separate conspiracies. Under Movant's theory, Count One alleges two conspiracies (under 18 U.S.C. §§ 371 and 1203); Count Two alleges one (under 18 U.S.C. §1203); Count Three alleges one (under 8 U.S.C. § 1324); and Count Four alleges a fifth conspiracy (under 8 U.S.C. § 1324), leading to a "multiplicitous scenario," where there is a "danger" of punishing Movant multiple times for the same conduct. (Document # 291 at 39) Contrary to Movant's assertion, the Superseding Indictment does not improperly cast one conspiracy as multiple conspiracies. (See document # 30). The Superseding Indictment charged Movant with violating two separate conspiracy statutes: Conspiracy to Commit Hostage taking in violation of 18 U.S.C. §§ 371 and 1203 (count one) and Conspiracy to Harbor Illegal Aliens in violation of 8 U.S.C. § 1324(a)(1)(A)(iii) (count three).

"It is well settled that a single transaction can give rise to distinct offenses under separate statutes without violating the Double Jeopardy Clause. This is true though the 'single transaction' is an agreement or conspiracy." American Tobacco Co. v. United States, 328 U.S.781 (1946). In Albernaz v. United States, 450 U.S. 333 (1981), the Supreme Court upheld consecutive sentences for two conspiracy charges arising from a single agreement or conspiracy having dual objectives. The Court held that because the conspiracy violated two different statutes, the two different charges – conspiracy to import marijuana in violation of 21 U.S.C. § 963 and conspiracy to distribute marijuana in violation of 21 U.S.C. § 846 - were not multiplicitous. Id. at 140-41. The Court stated that when Congress has created two

1 separate offenses that applied to a single multi-objective conspiracy, the issue is whether
2 Congress intended that separate punishment be imposed for each offense. 450 U.S. at 337.
3 In the absence of clear Congressional intent, the Court applied the rule of Blockburger v.
4 United States, 284 U.S. 299 (1932). Albernaz, 450 U.S. at 337. "Under Blockburger,
5 Congress is deemed to have intended multiple punishments if each offense required proof of
6 a fact the other does not." U.S. v. Alerta, 96 F.3d 1230, 1237 (9th Cir. 1996)(citing 284 U.S.
7 at 304), overruled on other grounds, United States v. Nordby, 225 F.3d 1053 (9th Cir. 2000).
8 "The applicable rule is that where the same act or transaction constitutes a violation of two
9 distinct statutory provisions, the test to be applied to determine whether there are two
10 offenses or only one, is whether each provision requires proof of a fact which the other does
11 not." Blockburger, 284 US at 304.

12 Here, Movant was charged with, and convicted of, Conspiracy to Take Hostages
13 in violation of 18 U.S.C. § 1203, and Conspiracy to Harbor Undocumented Aliens in
14 violation of 8 U.S.C. § 1324. (Respondents' Exh. A, B) Title 18 U.S.C. § 1203 and 8
15 U.S.C. § 1324 have separate elements and require proof of distinct facts, as can be
16 demonstrated by the text of the statutes, as well as by the jury instructions given at Movant's
17 trial:

18 The defendant is charged in Count 1 of the superseding indictment with conspiracy to
19 commit hostage taking in relation violation of Section 1203 of Title 18 of the United
20 States Code. In order for defendant to be found guilty of this charge, the Government
must prove each of the following elements beyond a reasonable doubt:

21 First, beginning on or about March 23, 2000, and ending on or about March 25,
22 2000, there was an agreement between two or more persons to commit the crime of
Hostage Taking as charged in the superseding indictment;

23 Second, the defendant became a member of the conspiracy knowing of at least
24 one of its objects and intending to help accomplish it; and

25 Third, one of the members of the conspiracy performed at least one overt act for
26 the purpose of carrying out the conspiracy, with all of you agreeing on a particular
27 overt act that you find was committed.
28

1 An overt act does not itself have to be unlawful. A lawful act may be an element
2 of a conspiracy if it was done for the purpose of carrying out the conspiracy. The
3 government is not required to prove that the defendant personally did one of the overt
act.

4 (Document # 160 at No. 23.)

5 The court further instructed the jury that:

6 The defendant is charged in Count 3 of the superseding indictment with Conspiracy
7 to Harbor Aliens in violation of Section 1324(a)(1)(A)(v)(I) of Title 8 of the United
8 States Code. In order for a defendant to be found guilty of these charges, the
government must prove each of the following elements beyond a reasonable doubt:

9 First beginning on or about March 23, 2000, and ending on or about March 25, 2000,
10 there was an agreement between two or more persons to commit the crime of harboring
illegal aliens;

11 Second, the defendant became a member of the conspiracy knowing at least one of
12 its objects and intending to help accomplish it.

13 (Document # 160 at No. 28)

14 The Defendant is charged in Count 4 of the superseding indictment with
15 concealing, harboring and shielding from detection of certain aliens in
violation of Section 1324(a)(1)(A)(iii) of Title 8 of the United States
16 Code. In order for the defendant to be found guilty of this charge, the
Government must prove each of the following elements beyond a reasonable
doubt:

17 First, that one or more of the people harbored were aliens;

18 Second, that these aliens were not lawfully in the United States;

19 Third, that defendant knew or acted in reckless disregard of the fact that
20 these aliens were not lawfully in the United States;

21 And fourth, the defendant concealed, harbored or shielded from detection
22 these aliens for the purpose of avoiding these aliens' detection by immigration
authorities.

23 An alien is a person who is not a natural-born or naturalized citizen of the
24 United States. An alien is not lawfully in this country if the person was not
duly admitted by an Immigration Officer.

25 (Respondents' Exh. B at 148-49)

26 Although Movant's claim relies in part on the decisions of Launius v. United
27 States, 575 F.2d 770 (9th Cir. 1978), and Alerta v. United States, 96 F.3d 1230 (9th Cir.
28 1996), *overruled on other grounds*, his case is distinguishable from both of these cases. In

1 Launius, the court deemed multiplicitous two counts of conspiracy arising from the same
2 drug smuggling venture. 575 F.2d at 771. However, each of the conspiracy counts alleged a
3 violation of the same statute. Id. Unlike Lanius, in the instant case, the two conspiracy
4 charges were brought under different statutes.

5 Movant also relies on Alerta. In Alerta, the defendant was charged with a
6 general violation of a conspiracy statute, 18 U.S.C. §371, and with a specific charge of
7 conspiracy to distribute methamphetamine in violation of 21 U.S.C. § 846. 96 F.3d at 1239.
8 Unlike Alerta, Movant's case does not involve one general charge and one specific charge
9 which overlap. Rather, Movant was specifically charged with Conspiracy to Commit
10 Hostage Taking in Count One (in violation of 18 U.S.C. §§ 1203 and 371) and with
11 Conspiracy to Harbor Illegal Aliens in Count Two (in violation of 8 U.S.C. § 1324). Each
12 count charged a violation of a different statute with different elements. In view of the
13 foregoing, Movant's sixth claim for relief fails.

14 **IV. Constructive Amendment as Related to Claims Five and Six (Claim 7)**

15 In his seventh claim for relief Movant argues that because of the alleged
16 duplicitous offenses charged in Count One (as discussed in claim five) and the multiplicitous
17 conspiracy charges (as discussed in claim six), the indictment was constructively amended in
18 violation of the Fifth and Sixth Amendment. Because this claim relies on the theories
19 advanced in claims five and six, and the Court has concluded that these claims lack merit,
20 Movant's seventh claim also fails. ///

21 ///

22 ///

23 **V. Terminology of the Firearms Charge in Count Five (Claim 8)**

24 In his eighth claim for relief, Movant claims that Count Five of the Indictment,
25 which charges a violation of 8 U.S.C. § 924(c), is incorrectly charged and that the jury
26 instructions amended the Indictment. (document # 291 at 45)

27 Title 18 U.S.C. § 924(c) applies to "any person who, *during and in relation to*
28 any crime of violence or drug trafficking crime . . . *uses or carries* a firearm, or who, *in*

1 *furtherance of any such crime, possesses a firearm.*" 18 U.S.C. § 924(c)(1)(A) (1998)
 2 (emphasis added). Movant claims that this language refers to two separate and distinct
 3 offenses: (1) using or carrying a firearm *during and in relation to* a crime of violence, and
 4 (2) possessing a firearm *in furtherance of* a crime of violence. Movant claims that Count
 5 Five of the Superseding Indictment, as well as the jury instructions and verdict form, "mis-
 6 matched" or "cross-matched" the elements of these two offenses and, therefore, the
 7 distinction between the offenses was not clear to the jury, and that his sentence under Count
 8 Five should be vacated. (document # 291 at 43)

9 In support of his argument, Movant relies on United States v. Combs, 369 F.3d 925,
 10 934 (6th Cir. 2004), which held that an indictment that mixed elements of the "during and in
 11 relation to" clause and the "in furtherance of" clause of 18 U.S.C. § 924(c) could not be
 12 reasonably construed to charge a crime under federal law. In Combs, the indictment charged
 13 the defendant with "possess[ing] a firearm during and in relation to" the crime. Id. at 934.
 14 The Sixth Circuit held that "[i]ndicting Combs based on the *conduct* from the § 924(c)
 15 'possession' offense in conjunction with the *standard of participation* (during and in relation)
 16 from the other 'use' offense results in a failure to charge him with *any* codified federal
 17 crime." Id. (emphasis in original).

18 Count Five of Movant's Superseding Indictment (document # 30) states that:

19 On or about March 23, 2000, in the District of Arizona, defendants . . . did possess,
 20 carry, and brandish a firearm, to wit, a semi-automatic pistol, during and in relation
 21 to a crime of violence, that is, Hostage Taking as alleged in Count Two, a felony
 crime prosecutable in a Court of the United States.

22 In violation of Title 18, United States Code, Sections 924(c) and 2.

23 (document # 30) Movant claims that, like Combs, by using the terms of the two clauses
 24 interchangeably, the indictment was incorrectly charged. The indictment's language does
 25 not exactly match that of the statute, charging possession "during and in relation to" the
 26 crime, as opposed to "in furtherance of" the crime. Although Combs is similar to Movant's
 27 case, the Ninth Circuit does not share the views of the Sixth Circuit on this matter.
 28

1 Movant may challenge an allegedly defective indictment at any time, but because he
 2 does so at this late stage, the Court liberally construes the indictment in favor of its validity.
 3 Id. The Ninth Circuit has held that, "[w]hen the sufficiency of the indictment is challenged
 4 after trial it is only required that 'the necessary facts appear *in any form or by fair*
 5 *construction* can be found within the terms of the indictment.'" Id. at 1317 (quoting
 6 Kaneshiro v. United States, 445 F.2d 1266, 1269 (9th Cir. 1971)) (emphasis added in James).
 7 If an indictment refers to the statute under which the defendant is charged, and that statute
 8 clearly details the elements of the offense charged, this reference may be sufficient to cure
 9 the defects of the indictment. See, e.g., United States v. Ruelas, 106 F.3d 1416 (9th Cir.
 10 1997) (ruling that an indictment referring to 18 U.S.C. § 924(c), using the terms "use or
 11 carry" in the heading, and alleging possession of a weapon during the offense, included
 12 sufficient information to be valid); but see, Givens v. Housewright, 786 F.2d 1378, 1381 (9th
 13 Cir. 1986) (deciding indictment was not sufficient when it referred to a statute that simply
 14 defined the degrees of murder, but not the specific murder charge facing the defendant). In
 15 Movant's case, the indictment plainly listed both the possession and carrying acts, the during
 16 and in relation to standard, and made reference to 18 U.S.C. §924(c), which clearly lists the
 17 elements of the offense. The terms of the indictment together with the reference to the
 18 statute provided the necessary facts. Under this standard, the indictment was sufficiently
 19 clear and valid.

20 Movant also claims that the jury instructions³ in regard to 18 U.S.C. § 924(c)
 21 constructively amended the indictment by adding a new charge. The jury instructions not
 22 only included possession in the "during and relation to" clause, but also added the
 23 "possession in furtherance" language that had not appeared in the text of the indictment.
 24 Movant claims that this additional language added a new charge of possession in furtherance
 25 of the crime. Contrary to Movant's claims, possession in furtherance of the crime was not a

27 ³The jury instructions stated that Movant was, "charged with possessing, carrying, or
 28 brandishing a firearm during and in relation to hostage taking, or possessing a firearm in
 furtherance of hostage taking, in violation of 924(c) of Title 18 of the United States Code."

1 new charge, but rather it was a part of the originally indicted firearms charge under 18
2 U.S.C. § 924(c), the text of which could have been found in the referenced statute.

3 Finally, Movant claims that because of the variations in the possession offense
4 language, the verdict⁴ was not sufficiently clear to determine what the jury found in relation
5 to Count Five. This Court disagrees. Regardless of any discrepancy in the possession
6 language, the jury found Movant guilty of possession or use of a firearm in relation to a
7 crime of violence and the jury further found Movant guilty of use, carrying, brandishing a
8 firearm in relation to a crime of violence. (Respondents' Exh. B at 4-5). The verdict does
9 not include the language "possession in furtherance of a crime of violence" as Movant
10 claims. Movant is correct that in instructing the jury, the court stated that "the defendant
11 used, possessed, carried, or brandished a firearm in furtherance of hostage taking."
12 (Respondents' Exh. B at 151) However, because the jury found Movant guilty of the more
13 serious crime of using, carrying, or brandishing a firearm in relation to a crime of violence,
14 Movant suffered no prejudice as a result of the wording of the instructions.

15 Because the indictment was sufficiently charged, the jury instructions did not amend
16 the indictment, and the jury found Movant guilty of the offense under Count Five, therefore,
17 Movant's eighth claim fails.

18 **V. Ineffective Assistance of Counsel (Claims 3 and 9)**

19 **1. Failure of Counsel to Raise Claims Five Through Eight (Claim 9)**

20 In his ninth claim, Movant asserts that trial and appellate counsel rendered ineffective
21 assistance by failing to object to, preserve, or appeal the issues of duplicitous charging and
22 constructive amendments presented in claims five through eight of Movant's § 2255 Motion.
23 In order to prove a claim of ineffective assistance of counsel, Movant must demonstrate that
24

25 ⁴The verdict stated,

26 Possession or Use of A Fire Arm in Relation to a Crime of Violence, guilty. If found
27 guilty of Possession, we further find the defendant guilty of Use of a Firearm in Relation
28 to a Crime of Violence, guilty of Carrying a Firearm in Relation to a Crime of Violence,
and guilty of Brandishing a Firearm in Relation to a Crime of Violence.

(1) counsel's performance was unreasonable under prevailing professional standards; and (2) he was prejudiced thereby. Strickland v. Washington, 466 U.S. 668, 688-692 (1984). If Movant cannot establish the prejudice aspect of the Strickland analysis, there is no need to examine the performance prong. Id. at 697. In examining an ineffective assistance of counsel claim the court will "strongly presume that counsel's conduct was within the wide range of reasonable assistance, and that he exercised acceptable professional judgement in all significant decisions made." Id. at 689.

To establish prejudice under the Strickland test, Movant must establish a "reasonable probability that but for counsel's unprofessional errors, the result would have been different." Id. at 694. In this case, Movant claims he was prejudiced because if counsel had pursued the issues he raised in claims five through eight of his § 2255 Motion, his sentence would have been shorter, his special assessment would have been reduced, and his case would have been a 'dead-bang' winner." (Document # 304 at 40). However, as demonstrated in sections two through four above, Movant's arguments in claims 5-8 lacked merit. Therefore, there is no reasonable probability "sufficient to undermine confidence in the outcome" as required Strickland. Strickland, 466 U.S. at 694. Because the claims were invalid, the outcome of his conviction or sentencing would not have changed had counsel raised them at trial or appeal. Movant fails to demonstrate that but for counsel's alleged error the result would have been different.

The Ninth Circuit considered a similar situation in Baumann v. United States, 692 F.2d 565 (9th Cir. 1982). In Baumann, the movant claimed that his indictment was invalid due to multiplicitous and duplicitous charges, and that counsel was ineffective in not challenging the indictment. The Court decided that the movant "could not conceivably be prejudiced by his counsel's failure to move for dismissal of any of the counts of the indictment because, as the district court concluded, they were not defective as a matter of law." Id. at 572. Like Baumann, because Movant's claim of ineffective assistance is based on a legally invalid theory, Movant cannot have been prejudiced by his counsel's decisions. "The failure to raise a meritless legal argument does not constitute ineffective assistance of

counsel." Id. It was well within counsel's professional discretion to not pursue the arguments asserted in Movant's fifth through eighth claims.

By failing to show prejudice, Movant has failed to establish a claim of ineffective assistance of counsel.

2. Failure to pursue an Apprendi Claim (Claim 3)

In his third claim, Movant argues that trial counsel was ineffective in failing to pursue a claim under Apprendi v. New Jersey, 530 U.S. 466 (2000), which held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 530 U.S. at 490. Movant claims that trial counsel failed to argue an Apprendi violation during sentencing and failed to preserve an Apprendi issue for appeal. Movant contends that:

It is clear that counsel could have but did not investigate case law such as Apprendi v. New Jersey, and the multitude of cases that developed as a direct result of the U.S. Supreme Court's decision in Apprendi. Counsel could have, and should have, known that Apprendi changed what used to be viewed as "sentencing factors" to elements of the offense that must now, instead of being found by the sentencing judge by a preponderance of the evidence standard, be submitted to the jury and proven beyond a reasonable doubt.

(document # 291 at 23-24 (internal citation omitted)).

Movant's claim fails because the record indicates that trial counsel *did* raise the Apprendi issue with the Court on more than one occasion. Movant's counsel filed a Motion Re: Apprendi and Requirement of Necessary Elements for Count 5 of Indictment (document # 82) on February 4, 2002. This Motion argued that due to the ruling in Apprendi as well as McMillan v. Pennsylvania, 477 U.S. 79, 87-88 (1986), the issue of whether the defendant brandished a weapon under 18 U.S.C. 924(c) should be presented to the jury, because if found to be true, it would increase the statutory maximum sentence from five years to seven years. (Document # 82 at 1-2). Counsel also brought to the Court's attention United States v. Harris, 243 F.3d 806 (4th Cir. 2001), attaching a copy of the 4th Circuit opinion to his Motion. (Id. at exhibit A). At the time, the United States Supreme Court had granted certiorari in Harris as to the issue of whether a statute that increases the mandatory minimum

1 is an issue that should be given to a jury for proof beyond a reasonable doubt. At the
2 Motion Hearing before the Honorable James A. Teilborg on March 11, 2002, Movant's
3 counsel referred to the aforementioned Motion, and again asked that the issue of brandishing
4 under 18 U.S.C. § 924(c) be presented to the jury for proof beyond a reasonable doubt, in
5 accordance with Apprendi, and the pending Harris case. Contrary to Movant's assertion,
6 counsel did research the applicable case law applying the rule announced in Apprendi and
7 raised an Apprendi claim to the district court. Counsel pursued an Apprendi claim, in other
8 words, he took the very action which Movant asserts counsel was ineffective in failing to
9 take. Because counsel did pursue an Apprendi claim, Movant's claim of ineffective
10 assistance of counsel based on counsel's failure to pursue an Apprendi claim fails.

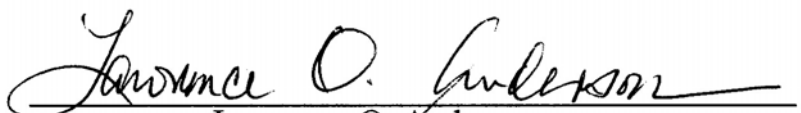
11 In accordance with the foregoing,

12 **IT IS HEREBY RECOMMENDED** that Movant's Motion to Vacate, Set Aside or
13 Correct Sentence pursuant to 28 U.S.C. § 2255 (document #290) be **DENIED**.

14 This recommendation is not an order that is immediately appealable to the Ninth
15 Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of
16 Appellate Procedure, should not be filed until entry of the District Court's judgment. The
17 parties shall have ten days from the date of service of a copy of this recommendation within
18 which to file specific written objections with the Court. *See*, 28 U.S.C. § 636(b)(1); Rules
19 72, 6(a), 6(e), Federal Rules of Civil Procedure. Thereafter, the parties have ten days within
20 which to file a response to the objections. Failure timely to file objections to the Magistrate
21 Judge's Report and Recommendation may result in the acceptance of the Report and
22 Recommendation by the District Court without further review. *See United States v. Reyna-*
23 *Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003). Failure timely to file objections to any factual
24 determinations of the Magistrate Judge will be considered a waiver of a party's right to
25 appellate review of the findings of fact in an order or judgment entered pursuant to the
26 Magistrate Judge's recommendation. *See*, Rule 72, Federal Rules of Civil Procedure.

27 DATED this 29th day of August, 2005.
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Lawrence O. Anderson
United States Magistrate Judge